**Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Wholly-Owned Subsidiaries and Individual Facilities and Each of Them *and* Elias Pierre *and* New England Health Care Employees, District 1199, National Union of Hospital and Health Care Employees, AFL–CIO *and* District 1199P, National Union of Hospital and Health Care Employees, AFL–CIO and District 1199P, National Union of Hospital and Health Care Employees, AFL–CIO *and* Communications Workers of America, AFL–CIO and United Food and Commercial Workers International Union, Local 917, AFL–CIO.** Cases 6–CA–20188–28, 6–CA–20188–35, and 6–CA–20188–36 (formerly 1–CA–24979 and 1–CA–25258 (1–2)), 6–CA–19726, 6–CA–19495–1, 6–CA–20188–23, 6–CA–20188–32 (formerly 14–CA–19080 and 14–CA–19301), and 6–CA–20188–22 (formerly 18–CA–18767 a/k/a 25–CA–18767)

November 10, 1999

## DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 24, 1998, Administrative Law Judge Margaret M. Kern issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief in opposition to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Beverly California Corporation, f/k/a Beverly Enterprises, its Operating Divisions, Wholly-Owned Subsidiaries and Individual Facilities and Each of Them, Meyersdale, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete paragraph 1 of the Order and renumber the subsequent paragraphs.

*Kim R. Siegert, Esq.* and *Alonzo Weems, Esq.,* for the General Counsel.

*Thomas Dowd, Esq*., for Respondent.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This supplemental proceeding was heard in Pittsburgh, Pennsylvania, on January 13, 1997, and in Indianapolis, Indiana, on April 28, 1997. A backpay specification and notice of hearing was issued on October 11, 1996, predicated on a Decision and Order of the Board dated January 29, 1993 (310 NLRB 222), which provided, inter alia, that Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Wholly-Owned Subsidiaries and Individual Facilities and Each of Them (the Respondent) take certain affirmative action, including offering full reinstatement and making whole Elias Jean-Pierre, Nicole Jean-Pierre, Suzanne LaFramboise, Nancy Bowser, Joseph Bryson, Donna Christensen, Kathy Cooley, Patty Martin, Kim Colgan Sylvester, David Snyder, Mary Walker, Shirley Niswonger, Janet Glenn, Maggie Roper, and Debra Wiley, for any loss of earnings they may have suffered as a result of Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On February 28, 1994, the United States Court of Appeals for the Second Circuit entered judgment enforcing the Board's Order in pertinent part (17 F.3d 580). On July 13, 1994, in a supplemental order, the court directed the Board to prepare a supplemental decision setting forth a series of cease and desist orders and other affirmative action to remedy the unfair labor practices found at Respondent's facilities. On March 29, 1995, the Board issued its Decision on Remand and Order (316 NLRB 888), again directing Respondent to take certain affirmative action including the making whole of the aforementioned 15 employees for any loss of earnings they may have suffered. On August 23, 1996, the United States Court of Appeals for the Second Circuit issued a supplemental judgment enforcing in full all of the affirmative remedial aspects of the Board Order dated January 29, 1993, and the Board's Decision on Remand and Order dated March 29, 1995.

Subsequent to the issuance of the backpay specification and notice of hearing herein, the parties resolved all backpay issues with respect to Nancy Bowser, Joseph Bryson, Donna Christensen, Kathy Cooley, Patty Martin, Kim Colgan Sylvester, David Snyder, and Mary Walker, and by order dated February 21, 1997, I granted the General Counsel's motion to withdraw those portions of the backpay specification relating to these employees. The parties further resolved all issues concerning Elias Jean-Pierre, Nicole Jean-Pierre, and Shirley Niswonger, and by order dated April 3, 1997, I granted the General Counsel's motion to withdraw those portions of the backpay specification relating to these employees. On April 28, 1997, at the proceeding in Indianapolis, the parties stated that they had resolved all issues with respect to Maggie Roper.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We disavow the judge's statement that Indiana Civil Rights Commission staff attorney Frederick Bremer's misrepresentations to discriminatees Wiley and Glenn "were so substantial as to rise to the level of fraud."

[2] Subsequent to the issuance of the judge's supplemental decision, the parties have resolved all backpay issues with respect to Suzanne La Framboise. By order dated September 22, 1999, the case involving La Framboise, Case 6–CA–19726, was severed and remanded to the Regional Director for Region 6 and the Respondent's exceptions to the judge's Order regarding La Framboise have been withdrawn. We shall modify the judge's recommended Order accordingly.

There remains for consideration backpay issues with respect to three employees: Suzanne LaFramboise, Debra Wiley, and Janet Glenn.

### General Principles

The purpose of a backpay award is to make whole the employee who has been discriminated against as the result of an unfair labor practice. The employee is entitled to receive what she would have earned normally during the period of the discrimination against her, less what she actually earned in other employment during that period. An employee must use reasonable diligence to find employment during the period of discrimination, and is not entitled to backpay for periods during which she voluntarily remained idle. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447 (8th Cir. 1963).

The finding of an unfair labor practice is presumptive proof that some backpay is owed and in a backpay proceeding, the sole burden on the General Counsel is to show the gross amounts of backpay due, that is, the amount the employee would have received but for the employer's illegal conduct. Once that is established, the burden is upon the employer to establish facts that would mitigate that liability. The backpay claimant should receive the benefit of any doubt rather than the respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *La Favorita, Inc.,* 313 NLRB 902, 903 (1994).

## FINDINGS OF FACT

### I. SUZANNE LA FRAMBOISE

La Framboise worked at Respondent's Meyersdale Manor facility (Meyersdale Manor) in Meyersdale, Pennsylvania, from June 1984 to October 16, 1986, when she was unlawfully discharged. La Framboise was employed as a full-time licensed practical charge nurse on the 11 p.m. to 7 a.m. shift, earning $6.31 at the time of her discharge. During the entire time that La Framboise was employed at Meyersdale Manor, she lived with her mother. In fact, La Framboise had, up until the time of her unlawful discharge, lived with her mother for her entire life with the exception of 1 year when she attended college away from home. La Framboise did not pay rent to her mother, but contributed $65 per month toward utility expenses. She drove 16 miles roundtrip to work at Meyersdale Manor. The roundtrip mileage was measured by La Framboise by driving the identical route she took to and from work and measuring the mileage by odometer. As discussed infra, I credit La Framboise testimony in its entirety, and I find that this measurement is accurate.

From October 1986 to March 1987, La Framboise searched for work, first in the Meyersdale area and then in surrounding areas. She looked in four local newspapers for employment opportunities and went to two different unemployment offices. La Framboise applied to approximately 20 different facilities in Pennsylvania and northern Maryland, but was not hired by any of them. In November or December 1986, she applied to Siemens Nursing Home, but did not get a job offer. She later saw an ad in the paper for the same job for which she had applied. She returned to the facility and spoke to the owner who explained to her that he did not want the same problems with the Union that La Framboise had caused at Meyersdale Manor. La Framboise name had appeared in local newspapers in connection with her union activities, both before and after her October 1986 termination.

In March 1987, La Framboise moved to Belleville, Michigan, to live with her brother. She did not have an offer of a job at the time she moved, but wanted to expand the area of her employment search. La Framboise' brother drove to Meyersdale and assisted her in moving her personal belongings. In the course of the move, she incurred the following expenses: $40 for gas, $20 for tolls, $30 to $40 for food, $45 for a hotel room for herself, and $45 for a hotel room for her brother. The drive from Meyersdale to Belleville took 8 to 9 hours, and she and her brother stopped for an overnight break. La Framboise shared her brother's apartment with his family, and paid her brother $150 cash in rent for March, April, May, June, July, and August 1987.

On March 9, 1987, La Framboise began working at Belle Woods Nursing Center in Ann Arbor, Michigan, as a nurses' aide. She worked there approximately 4 days in March 1987, as reflected in Appendix E-2 of the compliance specification, and drove 40 miles roundtrip to work. At the time, she was not yet licensed in the State of Michigan to work as a licensed practical nurse, and she applied for a Michigan LPN license at the beginning of April 1987.

In or about mid-March 1987, La Framboise left Belle Woods Nursing Center to work as a ward clerk/treatment aide at Middle Belt Hope Nursing Center. La Framboise drove 30 miles roundtrip from her brother's apartment to the nursing center, and she worked 5 to 7 days per week. In July 1987, La Framboise took a second job working for Bloomfield Nursing Services in Clawson, Michigan, doing private duty home nursing. The home in which she worked was 120 miles roundtrip from her brother's apartment, and she worked an average of 5 days per week. In September 1987, she resigned her job at Belle Woods Nursing Center, but continued working for Bloomfield Nursing Services.

In September 1987, La Framboise moved out of her brother's apartment and testified that she did so for two reasons: first, living in an apartment with her brother, his brother's wife and their two children was cramped, and second, she was in a position financially to live on her own. She sublet a two bedroom apartment in Canton, Michigan, which she selected because it was one of the cheapest apartments in the area, provided for building security, and was only 2 to 3 miles from her brother's residence. At the Canton apartment, La Framboise paid $650 monthly rent, $50 per month on average for electricity, and $60 per month on average for heat. She looked for a female roommate to share expenses, but only one person expressed an interest and La Framboise thought her flighty and unreliable and did not invite her to move in. She paid 12 months rent on the Canton apartment, from September 1987 to August 1988. La Framboise continued working for Bloomfield Nursing Services in Clawson, Michigan, and she continued to drive 120 miles roundtrip to work.

In February 1988, La Framboise left Bloomfield Nursing Services and went to work for West Bloomfield Nursing and Convalescent Center in West Bloomfield, Michigan, a distance of 120 miles roundtrip from her Canton apartment. She worked full time, 5 days per week and earned $11.57 per hour.

Prior to La Framboise' discharge in October 1986, her mother had been diagnosed with cancer, and La Framboise physically and emotionally cared for her mother and contributed to the household support as indicated previously. In or about August 1988, her mother was diagnosed with cancer for a second time and was in very poor health. La Framboise decided

to move back to Meyersdale and her primary motivation for doing so was to care for her mother. She was also motivated to move by the fact that her sublease for the Canton apartment expired in August 1988, and she believed that she had sufficiently "cleaned her work slate" so as to be able to return to Meyersdale to seek employment. La Framboise left her job at West Bloomfield Nursing and Convalescent Center and returned to Meyersdale without an offer of employment. She incurred the following moving expenses: $100 for a U-Haul rental; $60 for gas; $20 for tolls; $50 for food; $41 for a hotel room for her, and $41 for a hotel room for her brother who assisted her in the move.

On returning to Meyersdale, La Framboise applied for employment at three health care facilities, and within 2 weeks was offered a part-time LPN job at Somerset Hospital, earning less than she earned at West Bloomfield Nursing and Convalescent Center. She began working at Somerset on or about September 19, 1988, and worked up to 39 hours per week. She drove 60 miles roundtrip from her mother's home to Somerset Hospital, averaging 4 to 6 trips per week from 1988 to 1993. In January 1993, she became a full-time employee. It should be noted that the evidence establishes that all employees hired by Somerset are initially employed on a part-time basis, and are offered full-time positions as they become available. La Framboise testified that she accepted a full-time position as soon as it was offered to her.

From July 21 to October 9, 1991, La Framboise took a medical leave of absence from Somerset Hospital to undergo bilateral carpal tunnel release surgery. On May 9, 1994, La Framboise took a second leave of absence to care for her critically ill mother, who died in July 1994. La Framboise returned to work at Somerset on August 6, 1994.

By letter dated November 2, 1994, Respondent made an offer of reinstatement to La Framboise which read, in relevant part:

> This letter will serve as an unconditional offer to reinstate you to your former position of LPN, on the night shift, at Meyersdale Manor. . . . Please contact me . . . in order to discuss the prompt implementation of your reinstatement.
>
> If you are interested in reinstatement, but have questions concerning its implementation, you must contact us within fifteen (15) days of receipt of this letter. If you fail to accept this offer, or otherwise fail to respond to this letter within fifteen (15) days from its receipt, we will treat that failure as an acknowledgment by you that you are declining this offer.

La Framboise testified that she received this letter on November 4. She was of the opinion that the letter was vague in that it did not specify a wage rate, did not list actual benefits, and did not specify the exact job to which she would be returned. La Framboise called John O'Connell, compliance officer for Region 6, and told him of her concerns. She then called Wayne Chapman, the senior director for associate relations and the author of the letter. By letter dated November 14, 1994, Chapman again wrote to La Framboise as a followup to their telephone conversation. In this second letter, Chapman wrote, in relevant part:

> You will be reinstated to a full time position at a rate of pay of $11.27 per hour. Your employment date will be original date of hire which was June 29, 1984. Your benefits will be reinstated based upon your original hire date. Any voluntary benefit plans (medical, dental, retirement, stock purchase, etc.) which you participated in at the time you left will be reinstated on the day you return.
>
> Please let me know within fifteen (15) days of receipt of this letter if you will accept our offer set forth in my November 2, 1994 letter.

La Framboise testified that she received the November 14 letter on November 18, 1994. By letter dated November 22, 1994, La Framboise declined Respondent's offer of reinstatement.

## Analysis

### *A. Credibility*

I found La Framboise to be an entirely credible witness. She was responsive throughout her testimony, and maintained a calm, matter-of-fact demeanor. She was cross-examined about matters involving personal relationships with family members and friends, and a less confident witness might easily have become disconcerted by such inquiry. To the contrary, La Framboise maintained a dignified composure during both direct and cross-examination, which was impressive and I credit the testimony of La Framboise in its entirety.

### *B. The Issues*

The General Counsel alleges, and Respondent admits, that the backpay period for La Framboise commenced on October 16, 1986, and that the appropriate measure of the number of hours she would have worked is the average number of hours, adjusted for overtime, worked by representative LPN employees who remained in Respondent's employ at the Meyersdale Manor facility as set forth in the compliance specification. The parties further agree on the wage rates that La Framboise would have been paid had she remained in Respondent's employ. Respondent does not challenge the General Counsel's method of calculation of gross backpay, calendar quarterly net interim earnings, calendar quarterly net backpay, or total net backpay.

Respondent raises five challenges to the compliance specification: (1) the date that a valid offer of reinstatement was made; (2) the use of moving and living expenses as an offset to interim earnings; (3) the number of miles La Framboise drove to each place of interim employment; (4) the effect of La Framboise' voluntarily resignation from West Bloomfield Nursing and Convalescent Center; and (5) La Framboise' unavailability for work during the 1991 and 1994 leaves of absence.

#### 1. The offer of reinstatement

By letter dated November 2, 1994, Respondent extended to La Framboise "an unconditional offer to reinstate [her] to [her] former position of LPN, on the night shift, at Meyersdale Manor," and gave her 15 days to decide whether to accept the offer. La Framboise received the letter 2 days later, on November 4, 1994. As a direct result of La Framboise' inquiry, Respondent sent a second letter on November 14, 1994, which confirmed the details of the offer, and extended by an additional 15 days the time for La Framboise to decide whether the accept the offer. By letter dated November 22, 1994, La Framboise declined the offer of reinstatement.

The General Counsel maintains that the November 2 letter was not a valid offer of reinstatement, because it did not reference a rate of pay, seniority, or other benefits, and that a valid offer of reinstatement was therefore not made until the Novem-

ber 14 letter. The General Counsel further argues that the backpay period does not end until November 25, 1994, the date on which Respondent presumably received La Framboise' November 22, 1994 letter of rejection. Respondent argues that the November 2 letter did constitute an unconditional offer of reinstatement, and that the backpay period ends on that date. For the reasons set forth herein, I conclude that the November 2 letter constituted an unconditional offer of reinstatement, and that Respondent's backpay obligation was tolled on November 22, the date on which La Framboise rejected the unconditional offer.

While there is no specific rule under Board law requiring that an offer of reinstatement take any particular form, *Carruthers Ready Mix, Inc.,* 262 NLRB 739, 749 (1982), it is well settled that an employer bears the burden of establishing that it has made a valid offer of reinstatement tolling its backpay obligation. In order to sustain that burden, the offer of employment must be specific, unequivocal and unconditional. *A-1 Schmidlin Plumbing & Heating Co.,* 312 NLRB 191, 192 (1993); *Holo-Krome Co.,* 302 NLRB 452, 454 (1991). I find that Respondent's November 2 letter constituted such an offer. There was no ambiguity in the language of the offer. La Framboise was offered the exact same job she had prior to her discharge. Indeed, the General Counsel concedes in its brief that the letter was unequivocal and unconditional in its terms, but argues that since the offer did not specify a rate of pay, seniority status, or other benefits, the offer failed to satisfy the specificity requirement set out in *Holo-Krome.* I disagree.

An employer must extend to a discriminatee an offer of a specific job. That job must be either the same job the discriminatee held prior to her discharge, or a substantially equivalent position. The General Counsel cites no authority for its position that failure to specify the postreinstatement rate of pay or other terms or conditions of employment renders an offer of reinstatement invalid. Indeed, it does not appear that the Board has ever adopted such a formalistic approach. *Carruthers,* supra. It is not incumbent on an employer, having made an otherwise unequivocal and unconditional offer of employment to a specific job, which, as in this case, is exactly the same job the discriminatee had before she was unlawfully terminated, to further delineate the specifics of the job, i.e., rate of pay, vacation, and sick leave entitlements, pension benefits, parking privileges, or any other of the myriad of terms and conditions of employment which the discriminatee may have previously enjoyed. I am not unmindful of the fact that the offer of reinstatement in this case came 8 years after the discriminatory discharge and that the discriminatee understandably had a number of questions about the circumstances attendant to her reinstatement. That fact, however, does not alter the unequivocal and unconditional nature of the offer of reinstatement to a specific job. I therefore conclude that the November 2 letter constituted a valid offer of reinstatement.

Respondent argues that its backpay obligation terminated on November 2 when it made its unconditional offer of reinstatement. Alternatively, Respondent argues the November 14 letter was a valid offer of reinstatement and that its backpay obligation terminated on that day. According to Respondent, if an offer of reinstatement is rejected, "then the rejection is equally effective regardless of the amount of time that was given to consider the offer and there is no public policy served by extending backpay beyond the date that a rejected offer of reinstatement was made." (R. Br. 29–30.) Respondent's position is clearly contrary to the law and to established public policy.

There is a fundamental right of backpay claimants who have been discriminatorily discharged to a reasonable time to consider whether to return to a respondent's employ, and the Board has long held that backpay is tolled on the date of actual reinstatement, on the date of rejection, or in the case of those who do not reply, on the date of the last opportunity to accept. *Southern Household Products Co.,* 203 NLRB 881, 882 (1973). In his first letter on November 2, Chapman extended to La Framboise a period of 15 days to consider the reinstatement offer. After a telephone conversation with La Framboise during which they discussed the terms and conditions of the job in further detail, Chapman sent the second letter further extending the period of time for La Framboise to consider the offer. Respondent appropriately afforded La Framboise a total of 27 days to consider its offer of reinstatement. La Framboise rejected the offer on November 22, within the 27-day period, and Respondent's backpay liability ceased as of that date.

I therefore find that the backpay period for La Framboise extended from October 16, 1986, to November 22, 1994. I reject the General Counsel's argument that La Framboise is entitled to backpay for another 3 days until November 25, the date that Respondent presumably received her rejection letter in the mail. Unfortunately, the backpay specification does not afford sufficient basis for determining the amount of backpay attributable to November 23, 24, and 25, 1994. Accordingly, it will be left to the Regional Director to calculate the precise amount, if any, to be deducted from La Framboise backpay for the these 3 days. See, *Gary Aircraft,* 210 NLRB 555, 557 (1974).

2. Moving and living expenses

The General Counsel seeks an offset to interim earnings in the second quarter of 1987 and in the third quarter of 1988 for moving expenses incurred by La Framboise when she moved to and from Michigan. In challenging these offsets, Respondent argues that moving expenses are not properly considered when a discriminatee relocates to a new area without a preexisting offer of employment. Alternatively, Respondent argues that even if the expenses are a proper offset, the incursion of overnight hotel lodging expenses by La Framboise was unreasonable. I find both of Respondent's arguments without merit.

A discharged employee is not confined to the geographic area of former employment, and is entitled to be compensated for transportation expenses incurred in seeking interim employment by deducting such transportation expenses from interim employment earnings. *Best Glass Co.,* 280 NLRB 1365, 1370 (1986). Respondent's argument that moving expenses are only reimbursable if the discriminatee incurs the expenses in order to accept a preexisting job offer is an overly narrow and insupportable interpretation of the Board's rule.

Based on the credible testimony of La Framboise, I find that the *only* reason La Framboise moved from Pennsylvania to Michigan was to search for interim employment. Her mother had already been diagnosed with cancer, and La Framboise would not have left her mother, with whom she had lived her entire life, absent Respondent's unlawful discrimination against her and her resulting financial need to seek and obtain employment. After a diligent search for work in the Meyersdale area, the sufficiency of which is not challenged by Respondent, La Framboise reasonably concluded that she had to leave the area in order to find work. Significant to that decision was the

fact that La Framboise had been told by one prospective employer that she had become known in the area as a union activist and that she would not be hired. The moving expenses which she incurred in the course of her search for interim employment in Michigan are therefore a proper offset to interim earnings.

Similarly, I find that the moving expenses incurred by La Framboise during the course of her return move to Pennsylvania in the third quarter of 1988 are also a proper offset to interim earnings for that period. For the reasons discussed infra, La Framboise was not required to continue her employment in Michigan. The expenses which she incurred to return to Pennsylvania and to seek employment there are properly chargeable to Respondent.

Finally, I conclude that the amount of money La Framboise expended on the two moves, $180 and $250, respectively, was reasonable under the circumstances. I reject Respondent's contention that La Framboise and her brother should have driven 8 to 9 hours each way without stopping for overnight lodging. Because of the distances involved, it was reasonable for La Framboise and her brother to rest overnight, and the cost of the lodging is properly borne by Respondent.

Although not raised by Respondent, I find that the General Counsel's calculation of the moving expense offset for the March 1987 move is erroneous and must be corrected. It is clear from the evidence that La Framboise moved from Pennsylvania to Michigan in the first quarter of 1987. However, the $180 in moving expenses incurred during this trip is inexplicably charged by the General Counsel as an offset to interim earnings for the second quarter of 1987 (App. E-3 of the compliance specification). It is well settled that expenses are deducted from interim earnings on a calendar quarter basis and that no expenses are allowed over the amount of earnings, if any, during the respective calendar quarter. *Mastro Plastics Corp.,* 136 NLRB 1342, 1348 (1962), enfd. 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). In the first quarter of 1987, La Framboise had $47.25 in interim earnings and excess mileage and living expenses of $105. Since the moving expenses incurred during that same quarter are in excess of interim earnings, there is no further offset. The net backpay figure for the first quarter of 1987 remains $3646, and the net backpay figure for the second quarter of 1987 is reduced to $1054.

With respect to living expenses, contrary to Respondent's arguments, it is appropriate for the excess rent which La Framboise was required to pay during the period of time she lived in Michigan to be deduced from her interim earnings during that period. *Kaase Co.,* 162 NLRB 1320, 1327 (1967). The reasonableness of the rental amount of $150 paid by La Framboise to her brother is not challenged by Respondent. Respondent does challenge La Framboise' decision to move out of her brother's apartment and the application of the additional $500 per month in rent as an offset to interim earnings.

La Framboise credibly testified that living with her brother, his wife and their two children in an apartment was cramped and that her presence was an imposition on her brother's family. Respondent argues that the burden was on the General Counsel to call the brother to testify to corroborate La Framboise testimony. I disagree. As I have stated repeatedly throughout this decision, La Framboise was a credible witness, and her testimony is more than enough for me to conclude that, in fact, La Framboise was a burden on her brother's family, and she could no longer continue to live with him. La Framboise also testified credibly, and without contradiction, that she rented the cheapest apartment in the area consistent with her needs, including building security. Unlike Respondent, I do not find that La Framboise was required to move in with strangers or have strangers move in with her in order to accommodate Respondent's interests. Respondent, not La Framboise, is the wrongdoer here, and La Framboise, the victim of Respondent's unlawful acts, was not required to jeopardize her physical and emotional well being in order to mitigate Respondent's liability. Respondent's Dickensian argument, made during the course of the hearing, that La Framboise had an "obligation to take as low a living expense as possible," regardless of the consequences to her welfare, has no basis in the law.

I therefore conclude that the excess living expenses incurred during the period of time La Framboise was living and working in Michigan were properly calculated in the compliance specification as an offset to interim earnings.

3. Excess mileage expenses

For each interim job held by La Framboise, the General Counsel seeks mileage expenses for miles driven in excess of the 16-mile roundtrip La Framboise drove to work while employed by Respondent. Respondent challenges La Framboise measurement of the mileage she drove to each place of interim employment, claiming that her figures are so inaccurate as to warrant conclusion that she "outright lied." Respondent's argument is wholly unsupported by the record evidence.

La Framboise initially estimated the number of miles she drove to and from each job, and it was on the basis of these estimates that the backpay specification was drawn. Thereafter, but prior to the hearing, La Framboise measured the mileage with her car odometer by driving the exact routes she drove to each interim job. In each case, the mileage, as measured by the odometer, was slightly greater than the earlier estimate. The General Counsel did not amend the compliance specification to reflect the higher mileage figure, and I therefore will utilize the lower estimated mileage figures set forth in the compliance specification. I have considered Respondent's argument that the General Counsel's failure to revise the mileage figures upward reflects poorly on La Framboise credibility, and I reject it as I found La Framboise to be an entirely credible witness.

In lieu of precise measurement, Respondent introduced maps from the American Automobile Association to show the general locations where La Framboise lived and worked in Michigan and Pennsylvania. Respondent requests that I calculate, with ruler and pencil, the number of miles between each location. The difficulty with this approach, as aptly pointed out in the General Counsel's brief, is that Respondent failed to adduce specific testimony from La Framboise as to the precise streets she drove to work. In the absence of record evidence, I decline to divine the routes she drove to work. I wholly credit La Framboise mileage calculations, and the excess mileage driven by La Framboise to each place of interim employment was properly applied in the compliance specification as an offset to interim earnings. *Kaase Co.,* supra at 1326.

4. La Framboise voluntary resignation from interim employment

Respondent maintains that its backpay obligation to La Framboise terminated in the third quarter of 1988 when she voluntarily resigned from her job at the West Bloomfield Nursing and Convalescent Center in order to return to Meyersdale,

Pennsylvania to care for her mother. I find this argument without argument.

While the general burden of proof is on the General Counsel to establish the damage which resulted from La Framboise' discriminatory discharge, the burden to prove diminution of those damages based on willful loss of interim earnings is squarely on Respondent, and any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer. *Big Three Industrial Gas,* 263 NLRB 1189, 1190 fn. 8 (1982); *Mastro Plastics,* supra at 1346. A claimant who obtains a job but then leaves it for a justifiable reason is not deprived of all further claims to backpay since the assumption is that the reason for the claimant's quitting the job would not have been present absent Respondent's wrongdoing. The Board has dealt specifically with the issue of a discriminatee's right to reject employment which fails to accommodate personal or family needs. In *Kaase Co.,* 162 NLRB 1320 (1967), the discriminatee had worked for over 14 years on the night shift so that she could attend to the care of her children and grandchild. After she was illegally discharged, the discriminatee limited her search for interim employment to work on the night shift. The Board held, "While her longstanding assignment to that shift may have been dictated in large measure by her own preferences, on the other hand, it was obviously a satisfactory arrangement for the Employer . . . . Having adjusted her own life to this schedule it does not seem reasonable to hold that when Kaase unlawfully chose to sever the employment relationship, it became the duty of the innocent victim of that discrimination to change her mode of living, discontinue the care of her grandchild and accept daytime employment at some other bakery, all for the purpose of reducing Kaase's backpay liability and thus accommodating the wrongdoer." Id. at 1332. Similarly, in *John S. Barnes Corp.,* 205 NLRB 585, 588 (1973), a discriminatee who had worked the day shift was not required to continue interim employment on the night shift when the night shift posed too difficult a pattern of life for himself and for his family. The Board reasoned that the discriminatee was not required to continue working at a job which he was not required to accept in the first place.

In this case, La Framboise had lived with her mother for her entire life. The evidence firmly establishes that she would not have moved away from her mother, whom she cared for physically, emotionally, and financially, absent her illegal discharge by Respondent. The move was disruptive to La Framboise' personal life and resulted in her having to leave her mother at a time when her mother was suffering from cancer. Since La Framboise was not required to move to Michigan in the first place, the job in West Bloomfield, Michigan, was not a substantially equivalent position to that from which she was discriminatorily terminated. Her voluntary resignation from that job therefore did not constitute a willful loss of earnings. *Twistex, Inc.,* 291 NLRB 46, 48 (1988); see also *Ryder System, Inc.,* 302 NLRB 608, 609 (1991).

Even if I were, however, to conclude that the West Bloomfield job was a substantially equivalent position, a discriminatee does not incur a willful loss of earnings by quitting an interim job for a justifiable reason. *Electrical Workers IBEW Local 453 (Sachs Electric),* 277 NLRB 1129 fn. 2 (1985), *Mastro Plastics Corp.,* 136 NLRB 1342, 1349–1350 (1962*),* enfd. 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). A reason which is personal to the discriminatee can be deemed justifiable and serve to negate a contention of willful loss of earnings in violation of a claimant's obligation to minimize his or her losses. *East Texas Steel Castings Co.,* 116 NLRB 1336 (1956), enfd. 255 F.2d 284 (5th Cir. 1958). I find that La Framboise need to return home to care for her critically ill mother constituted a justifiable reason.

For all of these reasons, I find that Respondent's backpay obligation continued after La Framboise resignation from West Bloomfield Nursing and Convalescent Center.

5. The 1991 and 1994 leaves of absences

It is not in dispute that La Framboise was absent from her employment at Somerset Hospital from July 21 to October 9, 1991, recuperating from bilateral carpal tunnel release surgery. Neither side contends that this was a work-related injury. Respondent maintains that La Framboise was unavailable for work during this period, and had she been employed by Respondent during this time, her leave would have been unpaid. The General Counsel, on the other hand, maintains that La Framboise would have been able to use accrued sick leave benefits during this period. For the reasons set forth herein, I agree with the General Counsel's position.

La Framboise testified that while employed at Respondent's Meyersdale Manor facility, she was entitled to paid sick leave benefits, although she could not recall the basis on which sick leave was calculated. Corroborating La Framboise' testimony, Respondent introduced a one-page excerpt from the Hourly (Nonexempt) Associate's Handbook dated March 1991, which stated in relevant part:

> To assist you when you are unable to work because of an illness or injury, our company provides for paid sick time for all full- and part-time associates. You become eligible for sick time after three months of employment. State disability or work related benefit payments will be deducted from the total amount of sick pay you receive. Sick pay cannot be used for anything other than a bona fide illness and cannot be cashed out if unused. Your supervisor may request a doctor's certificate prior to approving sick pay.

The excerpt also references medical, personal and military leaves of absences without pay. Respondent argues that La Framboise would have been eligible only for unpaid medical leave, not paid sick leave, but offered no evidence in support of that argument. La Framboise testified without contradiction that she would have been entitled to use accrued sick leave benefits, and I so find on the basis of that testimony. Certainly the record would have been more complete had a witness testified as to exactly how sick leave benefits were calculated by Respondent in the years following La Framboise discharge, and how much accrued sick leave La Framboise had at the time of this leave of absence. However, it was Respondent's burden to put forward that evidence, and the uncertainty created by Respondent's failure to do so is resolved against Respondent.

The issues surrounding La Framboise' May 9 to August 6, 1994 leave to care for her dying mother are more easily resolved. La Framboise testified that she accrued 2 weeks paid vacation leave each year on her employment anniversary date. No evidence was introduced by Respondent contradicting this testimony, and there is no evidence to suggest that there was a cap on the amount of vacation time an employee could accrue over a span of years. At the time of La Framboise discharge, she had 2 remaining vacation days for 1986. She thereafter accumulated 10 vacation days in June 1987, 1988, 1989, 1990,

1991, 1992, and 1993. Thus, 72 vacation days were available to La Framboise when she commenced her leave of absence on May 9, 1994. There were 65 workshifts between May 9 and August 6, 1994, and La Framboise' accumulated vacation time was more than sufficient to provide La Framboise with paid leave during that period of time. In addition, the one page of the employee handbook introduced by Respondent reveals that La Framboise would have been entitled to up to 3 days' paid bereavement leave on the death of her mother.

In conclusion, I find that La Framboise would have received paid sick leave benefits for her leave of absence in 1991, and paid vacation benefits and bereavement leave for her leave of absence in 1994. Accordingly, these periods of time are properly calculated as part of La Framboise gross earnings. Appendix E-32 of the compliance specification originally reflected a calculation of backpay for the entire period of the 1994 leave of absence. At the hearing, the General Counsel amended appendix E-32 to except the period July 1 to 28. The basis for the revised calculation is not clear and appears to be against the weight of the credible evidence. I therefore find that the General Counsel's original calculation was proper.

## II. DEBRA WILEY AND JANET GLENN

### FINDINGS OF FACT

### *A. The Settlement Agreements*

Wiley and Glenn were employed at Respondent's Sycamore Village Health Care Center in Kokomo, Indiana, as full-time nursing assistants, and both were unlawfully suspended and discharged on June 25, 1987. Thereafter, Glenn and Wiley each filed charges with the Indiana Civil Rights Commission (ICRC) alleging that their termination by Respondent was discriminatorily motivated because of their race. These charges were pending at the same time that the Board charges were pending. It is not in dispute that unconditional offers of reinstatement were extended to both Glenn and Wiley on August 19, 1991, which offers were declined.

On July 20, 1988, Respondent entered into settlement agreements with the United Food and Commercial Workers International Union, Local 917, AFL–CIO (the Charging Party) and with Wiley and Glenn. These agreements provided for the payment of $1000 to both Wiley and Glenn. Wiley and Glenn further agreed to resign from their employment effective June 30, 1987. The women were encouraged by the Charging Party's representatives to sign these agreements, even though both expressed serious misgivings about the terms of the agreements. They signed and each accepted the payment of $1000. By order dated November 30, 1988, Administrative Law Judge Martin J. Linsky refused to approve the settlement agreements, and denied the Charging Party's request to withdraw the charges with respect to Wiley and Glenn. Their cases proceeded to trial and on November 9, 1990, Judge Linsky issued the underlying decision which found, inter alia, that Glenn and Wiley had been discriminatorily discharged, and recommended reinstatement and backpay as a make whole remedy. Exceptions to Judge Linsky's decision were filed and pending at the time that the ICRC case was approaching the trial stage in August 1991.

Todd Ponder, an experienced labor attorney who has practiced before the Board, was retained by Respondent sometime in 1991 to represent Respondent's interests before the ICRC. Ponder testified that he was completely unaware of the pendency of the unfair labor practice case until August 1991 when, in the course of a pretrial deposition, Glenn made reference to the Board proceeding. Ponder immediately ceased taking Glenn's deposition and canceled Wiley's deposition which was to take place that afternoon or the next day. He then determined that there was no need to go forward with the ICRC case because the discriminatees were entitled to the same make-whole remedy of reinstatement and backpay before the ICRC as they would be entitled to in the Board proceeding. Ponder testified:

> So the decision was made to go ahead and settle the [ICRC] matter to make payment to these two complainants of their full back pay and to offer them reinstatement and to also make it clear . . . that the payment that they would receive in the settlement of the [ICRC] matter would be viewed by them as representing their full back pay for purposes of the NLRB case as well.

Frederick Bremer was the staff attorney for the ICRC handling the Glenn and Wiley matters. Together, Bremer and Ponder calculated "full" backpay for each discriminatee. Ponder provided gross backpay information, and Bremer gathered information about interim earnings. Glenn was able to provide Bremer with information regarding interim earnings and unemployment compensation benefits which he deducted from the gross backpay amount. The total net backpay calculated by Bremer and Ponder for Glenn was $3200, which they rounded to $4000. According to the compliance specification, the total net backpay owed to Glenn was $23,169.

By October 1991, Wiley had moved out of State and was supposedly unable to provide Bremer with interim earnings information. In the absence of this information, Ponder testified that he needed to come up with a "plausible technique" to calculate backpay and he therefore assumed that Wiley had been employed continuously throughout the backpay period earning the minimum wage. He calculated what that amount would have been and arrived at a total net backpay amount of $4,246, which he and Bremer rounded to $5000. According to the compliance specification, the total net backpay owed to Wiley was $34,203. On October 21, 1991, Ponder wrote to Bremer:

> With respect to the Wiley matter, it was my understanding (as we discussed earlier today) that we had mutually agreed to come up with an arbitrary back-pay figure in her case, since the supporting documentation was not available, and that we had mutually agreed on a full back-pay figure of $5,000.

Ponder readily admitted during his testimony that he did not rely on Board guidelines in calculating the backpay amounts. Bremer also acknowledged that at the time he was making these calculations, he had no idea what remedies Wiley and Glenn were entitled to under the Act. He did not know how the Board computed backpay, did not consult with anyone at the Board to find out how backpay is computed, and he did not know what percentage of backpay the amounts calculated by him and Ponder represented by Board standards. At no time did Bremer or Ponder contact the General Counsel or the Charging Party. Ponder did consult with Respondent's trial counsel who litigated the underlying case before Judge Linsky, but the content of that conversation was not disclosed.

Three separate documents were drafted as part of the ICRC settlement. The first document was entitled "Negotiated Settlement Agreement" and provided for the withdrawal of each discriminatee's parallel race discrimination case before the Equal Employment Opportunity Commission. This single page

agreement was uncaptioned and was signed by Ponder for Respondent, and Wiley and Glenn respectively. No one signed this document on behalf of the ICRC.

The second document, which was physically prepared in Ponder's office, was entitled "Settlement Agreement" and bore the following caption:

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

[WILEY/GLENN]
Complainant

v.

Docket No. Emra87060666
EEOC No. 24F870174

BEVERLY ENTERPRISES – INDIANA, INC.
Respondent

This agreement provided for the payment of $5000 to Wiley and $4000 to Glenn, "such amount representing full settlement of any and all damages (including attorneys' fees) in relation to the above-referenced complaint and charge, full back pay from the date of Complainant's termination through August 19, 1991, and full consideration for all claims released and waived by Complainant herein." This agreement was signed by Ponder and by each discriminatee, and was signed and approved by four Commissioners of the ICRC.

The third document which was part of the overall ICRC settlement was also prepared in Ponder's office and was entitled "SSA" (SSA). It bore the same ICRC caption and read as follows:

> THIS SUPPLEMENTAL AGREEMENT between [Wiley/-Glenn], hereinafter called Complainant, and [Respondent], is entered into as a supplement to the "Settlement Agreement" executed by the parties simultaneously herewith.
>
> The parties hereby agree that, notwithstanding any other language in the accompanying Settlement Agreement executed herewith, nothing in that Settlement Agreement operates to waive, release, or withdraw Complainant's rights with respect to Case No. 6–CA–20188–22 (formerly 25–CA–18767), presently pending before the National Labor Relations Board. However, Complainant agrees and stipulates (1) that she was offered reinstatement by Respondent as a full-time nursing assistant on the day shift at Respondent's Sycamore Village Health Care Center in Kokomo, Indiana, effective August 19, 1991; (2) that she knowingly and voluntarily declined Respondent's reinstatement offer; (3) that the back pay amount paid by Respondent in accordance with paragraph six (6) of the accompanying Settlement Agreement shall be considered and treated by Complainant as her full back pay and make whole relief with regard to the period from June 30, 1987 through and including August 19, 1991; and (4) that she will consider and treat said payment as payment in full of any back pay and make whole remedy to which she may hereafter become entitled in connection with the foregoing case before the National Labor Relations Board.

The SSA was neither reviewed nor approved by the ICRC Commissioners despite the fact that the document bore that agency's caption. Bremer testified that when the Commissioners approved the settlement agreement, they were unaware of the terms of the SSA, consistent with the practice of the agency not to involve itself in matters collateral to its jurisdiction.

Ponder testified that although the SSA was an agreement between Respondent and the discriminatees, no one on behalf of Respondent ever communicated with the discriminatees. Rather, Ponder chose to communicate through Bremer. Ponder was emphatic that he had told Bremer in no uncertain terms that Bremer had to make clear to the discriminatees that the SSA was "the most integral part" of the overall ICRC settlement. He testified, "the overriding goal, as I said before, was to make it absolutely clear that the number that we [Ponder and Bremer] mutually agreed upon would be agreed by these two ladies as being their full back pay in the event that they subsequently got an award from the NLRB of full back pay."

On October 23 and 24, Bremer presented the three settlement documents to Glenn and Wiley. Both women testified that they were confused by the language of the SSA. Glenn testified that to her it was like "double talk," on the one hand stating that the agreement would not operate to waive, release, or withdraw her rights in the Board proceeding, but on the other hand limiting backpay in the Board proceeding. Wiley and Glenn each asked Bremer about the confusing language, and both testified that Bremer told them unequivocally that the SSA had nothing to do with the Board case. Bremer could not recall during his testimony what, if anything, he said to the women about the impact that the ICRC settlement would have on the pending Board proceeding.

Wiley testified that at the time she signed the three settlement documents, she did not know how much backpay she was owed. Similarly, there is no evidence in the record that Glenn knew how much backpay she was owed. Neither woman was represented by private counsel.

### *B. The Vacation Offset*

Had Wiley continued in Respondent's employ, she would have received paid vacation benefits of 6 hours in the third quarter of 1987, 2 weeks in the third quarter of 1988, 2 weeks in the third quarter of 1989, 3 weeks in the third quarter of 1990 and 1-1/2 weeks in the third quarter of 1991. Had Glenn continued in Respondent's employ, she would have received paid vacation benefits of 2 weeks in the third quarter of 1988, 2 weeks in the third quarter of 1989, 2 weeks in the third quarter of 1990 and 1 week in the third quarter of 1991. These facts are not in dispute.

Wiley testified that she was unemployed for some time during 1988, but could not recall if she was unemployed during 1989, 1990, or 1991. Glenn testified that she too was unemployed for some period of time during 1988. She was not sure if she was unemployed in 1989, and she was not asked if she was unemployed in 1990 or 1991. Nahand testified that in preparing the backpay specification, she did not ascertain whether Wiley and Glenn worked each week during the backpay period. Rather, all backpay calculations were done on a quarterly basis.

## Analysis

### *A. Credibility*

I fully credit the testimony of Wiley and Glenn. Both women impressed me as forthright and simply believable. I also found both women to be more credible than attorney Bremer. Bremer's was extremely vague throughout his testimony, and he could not recall the most important evidence in the case: whether or not he ever told Wiley and Glenn that the SSA was intended to preclude them from getting any further backpay before the Board. In contrast, Wiley and Glenn clearly recalled being told by Bremer that the SSA would not impact on the case before the Board. This testimony was credible for several reasons. First, the testimony stands uncontradicted in the record. Second, at the time of Wiley and Glenn's discussion with Bremer, Judge Linsky had already issued his decision finding that they had been discriminatorily discharged under the Act, and recommending that they be reinstated and be made whole. Glenn and Wiley's focus was very much on preserving that which they had already won, and it makes eminent sense that they would have questioned the plainly contradictory language in the SSA. I find Glenn's characterization of the language as "double talk" particularly apt. They asked Bremer what the language meant and he told them that it didn't mean anything, clearly leading them to believe that they were only settling the ICRC case. Bremer admitted in his testimony that the agency he worked for, the ICRC, had no interest in the Board proceedings and no interest in the SSA. Yet Bremer singlehandedly got Wiley and Glenn to sign the SSA. I can only conclude that the reason Bremer did this was to get the ICRC case settled. In doing so, I find he made significant misrepresentations to Wiley and Glenn.

With respect to attorney Ponder, I found his testimony credible for the most part. He drafted the settlement documents in this case, and as an experienced labor attorney with Board experience, he knew exactly how much he was trying to get the discriminatees to settle for in terms of Board backpay. He admitted that he resorted to developing a "plausible technique" to calculate Wiley's interim earnings, a technique which he acknowledged in writing was arbitrary, and which was without any basis in Board law. I credit him when he said he did not speak with the discriminatees and that he did not consult with any representative of the General Counsel or the Charging Party, but that he did consult with Respondent's trial counsel in the Board proceeding.

### *B. The Issues*

The backpay period for both Wiley and Glenn commenced on June 25, 1987, and terminated on August 19, 1991, when they declined a valid offer of reinstatement. The General Counsel alleges that as of the date of the offer of reinstatement, Wiley was owed $34,203 in backpay and Glenn was owed $23,169 in backpay. At the hearing, Respondent affirmatively stated that it was not challenging the General Counsel's backpay calculations.

Respondent raises three challenges to the compliance specification: (1) the effect of a $1000 payment made to each of the discriminatees in July 1988; (2) the effect of settlement agreements entered into in October 1991; and (3) the appropriateness of the vacation offset.

### *C. The 1988 Payment*

In July 1988, Respondent paid $1000 to Wiley and to Glenn in an effort to settle the unfair labor practice case. The General Counsel makes two arguments in his brief concerning these payments: first, that Respondent failed to plead in its answer to the compliance specification that these payments had been made and therefore waived its right to receive credit against its backpay liability; and second, that Respondent failed to prove that the payments were for the purpose of backpay. I find merit in General Counsel's arguments.

Judge Linsky wrote in his decision that an informal settlement agreement was reached between the Charging Party and Respondent which provided for the resignation of Wiley and Glenn and the payment to them of $1000. Judge Linsky did not denominate the payment as backpay, and nothing in the language of the settlement agreement itself, which was made part of the record in this supplemental proceeding, refers to the payment of backpay. Regardless of what the intended nature of the payment was when it was made in July 1988, Respondent had an obligation under the pleadings requirements of Section 102.56(b) of the Board's Rules and Regulations to state specifically that in the third quarter of 1988, Respondent was claiming a $1000 offset. Unquestionably, this information was within Respondent's knowledge, and goes directly to the issue of the accuracy of the figures in the specification for the third quarter of 1988. Respondent has offered no adequate explanation for its failure to raise this claim in its answer, and at no time did Respondent move to amend its answer with respect to this claim. I therefore decline to offset Respondent's backpay liability on the basis of the July 1988 payments.

### *D. The 1991 Settlements*

In October 1991, Respondent remitted $5000 to Wiley and $4000 to Glenn pursuant to the terms of the ICRC settlement. These payments were alleged by the General Counsel in the compliance specification as a proper deduction from total net backpay, and Respondent admitted that allegation. Respondent did not assert in its answer that the ICRC settlement payments should preclude any further recovery of backpay, and the General Counsel argues that this failure now precludes Respondent from raising the issue. I disagree. Initially, I find that the allegations in the compliance specification and Respondent's answer thereto sufficiently raised the issue of what, if any, effect the ICRC settlement should have on this backpay proceeding, and the issue was fully litigated at the hearing. In addition, Respondent moved to amend its answer at the hearing to specifically raise this issue, and that amendment was allowed. The Board has held that a respondent may properly cure defects in its answer to a compliance specification before a hearing either by an amended answer or a response to a notice to show cause. *Ellis Electric,* 321 NLRB 1205, 1206 (1996). I do not construe the Board's rule as prohibiting an administrative law judge from allowing an amendment after the opening of the hearing in all circumstances. In this case, the effect of the ICRC settlement had been placed in issue, and it would have been unfairly prejudicial to Respondent to have precluded it from presenting evidence regarding all the facts and circumstances surrounding the execution of that settlement. The issue of the preclusive effect of the agreement is therefore properly before me for resolution.

The Board has recently reiterated its commitment to its long standing policy of encouraging the peaceful, nonlitigious reso-

lution of disputes, and of encouraging parties to resolve disputes without resort to Board processes. *Flint Iceland Arenas,* 325 NLRB 318 (1998); *Independent Stave Co.,* 287 NLRB 740 (1987). This policy has been specifically extended to backpay proceedings. *American Pacific Concrete Pipe Co.,* 290 NLRB 623 (1988). The Board will examine all of the surrounding circumstances of a non-Board settlement agreement, including but not limited to:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

I have examined this case in light of these factors and I conclude that the ICRC settlement does not sufficiently satisfy the standards of *Independent Stave.*

With respect to the first *Independent Stave* factor, not only did the General Counsel and the Charging Party Local 917 never agree to be bound to the terms of the agreement, they weren't even consulted. By dealing exclusively with Bremer, Respondent's attorney circumvented the Board and the Charging Party. The General Counsel now vehemently opposes approval of the settlement agreement.

With respect to the second factor, the terms of the settlement are not reasonable under the circumstances. At the time this agreement was entered into, Wiley and Glenn had already been found to have been unlawfully discharged by Judge Linsky. The risks which were inherent in the litigation at its inception had been significantly reduced for Wiley and Glenn. They were certainly in a better negotiating position in October 1991 having prevailed at the trial level than they would have been had they not prevailed. Ponder conceded in his testimony that he assumed Respondent would have to pay backpay in the Board case, as that was his motivation to settle the ICRC case. Ponder and Bremer then calculated the backpay amounts without knowing, in Bremer's case, or caring in Ponder's case, how the Board in fact calculates backpay. Two striking examples of the inadequacy of their approach were their inclusion of unemployment compensation benefits in Glenn's interim earnings when the Board does not include such payments, *NLRB v. Gullett Gin Co.,* 340 U.S. 361 (1951), and their unfounded presumption that Wiley worked for the entire backpay period at the minimum wage. Ponder and Bremer concluded that payments of $4000 and $5000 constituted "full" backpay for Board purposes when, in fact, these amounts represented 17 percent of Glenn's backpay and less than 15 percent of Wiley's backpay. These amounts were clearly not reasonable given the stage of the litigation in October 1991.

With regard to the third factor, I conclude, based on all of the credible evidence, that the misrepresentations made to Wiley and Glenn were so substantial as to rise to the level of fraud. According to Ponder, the SSA was a purely private agreement between Wiley and Glenn and Respondent. Yet, when Ponder had the document prepared in his office, he captioned the document with the official caption of the ICRC. I can only conclude that this was intentional inasmuch as the first of the settlement documents, the "Negotiated Settlement Agreement," was not captioned. The SSA was then delivered to Wiley and Glenn not by Respondent, the only other party to the agreement, but by the ICRC attorney in the ICRC offices. The ICRC attorney then told Wiley and Glenn that the SSA would have no impact on Wiley and Glenn's claims before the Board, when in fact he had reason to believe otherwise. Finally, the women were clearly led to believe that the amounts calculated represented their full backpay and they were never told that the amounts were in fact only 15 and 17 percent of the amounts they were owed. Respondent cannot now claim that it did not know what the backpay amount was in October 1991, or that Ponder's calculations made at the time were in error. As an experienced labor lawyer, Ponder knew, or should have known, how to calculate backpay amounts under Board standards.

In view of my findings with respect to the first three *Independent Stave* criteria, it is unnecessary to address the fourth and final criteria.

Based on the forgoing analysis, I decline to give effect to the ICRC settlement agreement other than to credit Respondent with having made payments of $4000 and $5000 to the discriminatees in the fourth quarter of 1991. The General Counsel's calculations of total net backpay owed to Glenn of $19,169 and to Wiley of $29,203, which take into consideration these payments, are therefore appropriate.

### *E. The Vacation Offset*

It is well settled that vacation benefits are properly included in the backpay computation of a discriminatee. *Kaase Co.,* 162 NLRB at 1322. I reject Respondent's argument that Wiley and Glenn must have worked every week of every year of the backpay period in order to qualify for vacation benefits. The General Counsel's application of a vacation offset in the third quarter of each year of the backpay period was appropriate and reasonable.

## CONCLUSION

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

## ORDER

The Respondent, Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Wholly-Owned Subsidiaries and Individual Facilities and Each of Them, Meyersdale, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Pay to Suzanne LaFramboise the sum of $73,455 as net backpay, less the amount of backpay determined by the Regional Director to be attributable to the period November 23, 24, and 25, 1994, with interest computed thereon in the manner prescribed in the Board's Decision on Remand and Order and making the appropriate deductions from the amounts of any tax withholding required by state and Federal laws.

2. Pay to Debra Wiley the sum of $29,203 as net backpay with interest computed thereon in the manner prescribed in the Board's Decision on Remand and Order and making the appro-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

priate deductions from said amounts of any tax withholding required by state and Federal laws.

3. Pay to Janet Glenn the sum of $19,169 as net backpay with interest computed thereon in the manner prescribed in the Board's Decision on Remand and Order and making the appropriate deductions from said amounts of any tax withholding required by state and Federal laws.

APPENDIX A

**SUZANNE LAFRAMBOISE**

| Yr./Qtr. | Gross Backpay | Interim Earnings | Expenses | Net Interim Earnings | Net Backpay |
|---|---|---|---|---|---|
| 86-4 | $ 2,273.00 | $ - | $ - | $ - | $ 2,273.00 |
| 87-1 | 3,646.00 | 47.25 | 285.00 | 0.00 | 3,646.00 |
| 87-2 | 3,612.00 | 3,000.00 | 442.00 | 2,558.00 | 1,054.00 |
| 87-3 | 3,545.00 | 4,406.00 | 2,296.00 | 2,110.00 | 1,435.00 |
| 87-4 | 3,823.00 | 5,398.00 | 3,505.00 | 1,893.00 | 1,930.00 |
| 88-1 | 3,920.00 | 4,101.00 | 3,505.00 | 596.00 | 3,324.00 |
| 88-2 | 3,365.00 | 5,464.00 | 3,505.00 | 1,959.00 | 1,406.00 |
| 88-3 | 4,052.00 | 1,786.00 | 2,232.00 | 0.00 | 4,052.00 |
| 88-4 | 3,839.00 | 2,499.00 | 396.00 | 2,103.00 | 1,736.00 |
| 89-1 | 3,970.00 | 2,553.00 | 396.00 | 2,157.00 | 1,813.00 |
| 89-2 | 4,120.00 | 525.00 | 79.00 | 446.00 | 3,674.00 |
| 89-3 | 3,827.00 | 2,197.00 | 356.00 | 1,841.00 | 1,986.00 |
| 89-4 | 3,620.00 | 2,655.00 | 454.00 | 2,201.00 | 1,419.00 |
| 90-1 | 4,850.00 | 2,968.00 | 507.00 | 2,461.00 | 2,389.00 |
| 90-2 | 4,839.00 | 2,759.00 | 465.00 | 2,294.00 | 2,545.00 |
| 90-3 | 4,151.00 | 3,333.00 | 549.00 | 2,784.00 | 1,367.00 |
| 90-4 | 4,318.00 | 2,777.00 | 465.00 | 2,312.00 | 2,006.00 |
| 91-1 | 5,089.00 | 4,361.00 | 517.00 | 3,844.00 | 1,245.00 |
| 91-2 | 5,459.00 | 3,182.00 | 454.00 | 2,728.00 | 2,731.00 |
| 91-3 | 4,488.00 | 1,482.00 | 211.00 | 1,271.00 | 3,217.00 |
| 91-4 | 5,100.00 | 1,980.00 | 286.00 | 1,694.00 | 3,406.00 |
| 92-1 | 6,046.00 | 3,965.00 | 572.00 | 3,393.00 | 2,653.00 |
| 92-2 | 6,047.00 | 2,169.00 | 308.00 | 1,861.00 | 4,186.00 |
| 92-3 | 5,243.00 | 5,160.00 | 715.00 | 4,445.00 | 798.00 |
| 92-4 | 5,950.00 | 2,468.00 | 352.00 | 2,116.00 | 3,834.00 |
| 93-1 | 5,305.00 | 4,938.00 | 682.00 | 4,256.00 | 1,049.00 |
| 93-2 | 6,089.00 | 4,774.00 | 660.00 | 4,114.00 | 1,975.00 |
| 93-3 | 5,185.00 | 5,160.00 | 715.00 | 4,445.00 | 740.00 |
| 93-4 | 6,119.00 | 5,459.00 | 715.00 | 4,744.00 | 1,375.00 |
| 94-1 | 5,450.00 | 4,758.00 | 660.00 | 4,098.00 | 1,352.00 |
| 94-2 | 6,344.00 | 4,120.00 | 550.00 | 3,570.00 | 2,774.00 |
| 94-3 | 5,472.00 | 2,586.00 | 352.00 | 2,234.00 | 3,238.00 |
| 94-4* | 4,572.00 | 4,240.00 | 495.00 | 3,745.00 | 827.00 |
| | $ 153,728.00 | $ 107,270.25 | $ 27,681.00 | $ 80,273.00 | $ 73,455.00 |

* Note: Figures for 94-4 to be adjusted by Regional Director to reflect backpay period termination date of November 22, 1994.

APPENDIX B

**DEBRA WILEY**

| Yr./Qtr. | Gross Backpay | Interim Earnings | Expenses | Vacation Offset | Net Interim Earnings | Net Backpay |
|---|---|---|---|---|---|---|
| 87-2 | $ 169.00 | $ - | $ - | $ - | $ - | $ 169.00 |
| 87-3 | 2,226.00 | 1,152.00 | 259.00 | 0.00 | 893.00 | 1,333.00 |
| 87-4 | 2,203.00 | 2,268.00 | 608.00 | 0.00 | 1,660.00 | 543.00 |
| 88-1 | 2,311.00 | 0.00 | 0.00 | 0.00 | 0.00 | 2,311.00 |
| 88-2 | 2,382.00 | 0.00 | 0.00 | 0.00 | 0.00 | 2,382.00 |
| 88-3 | 2,702.00 | 1,894.00 | 0.00 | 291.00 | 1,603.00 | 1,099.00 |
| 88-4 | 2,382.00 | 1,035.00 | 0.00 | 0.00 | 1,035.00 | 1,347.00 |
| 89-1 | 3,250.00 | 712.00 | 0.00 | 0.00 | 712.00 | 2,538.00 |
| 89-2 | 3,494.00 | 712.00 | 0.00 | 0.00 | 712.00 | 2,782.00 |
| 89-3 | 3,838.00 | 829.00 | 0.00 | 128.00 | 701.00 | 3,137.00 |
| 89-4 | 3,494.00 | 1,497.00 | 0.00 | 0.00 | 1,497.00 | 1,997.00 |
| 90-1 | 3,076.00 | 1,449.00 | 0.00 | 0.00 | 1,449.00 | 1,627.00 |
| 90-2 | 3,277.00 | 1,449.00 | 0.00 | 0.00 | 1,449.00 | 1,828.00 |
| 90-3 | 3,826.00 | 746.00 | 0.00 | 172.00 | 574.00 | 3,252.00 |
| 90-4 | 3,277.00 | 1,195.00 | 0.00 | 0.00 | 1,195.00 | 2,082.00 |
| 91-1 | 3,021.00 | 1,002.00 | 0.00 | 0.00 | 1,002.00 | 2,019.00 |
| 91-2 | 3,252.00 | 1,002.00 | 0.00 | 0.00 | 1,002.00 | 2,250.00 |
| 91-3 | 1,922.00 | 539.00 | 0.00 | 124.00 | 415.00 | 1,507.00 |
| 91-4 | 0.00 | 5,000.00 | 0.00 | 0.00 | 5,000.00 | -5,000.00 |
| | $ 50,102.00 | $ 22,481.00 | $ 867.00 | $ 715.00 | $ 20,899.00 | $ 29,203.00 |

APPENDIX C

**JANET GLENN**

| Yr./Qtr. | Gross Backpay | Interim Earnings | Expenses | Vacation Offset | Net Interim Earnings | Net Backpay |
|---|---|---|---|---|---|---|
| 87-2 | $ 149.00 | $ - | $ - | $ - | $ - | $ 149.00 |
| 87-3 | 1,936.00 | 0.00 | 0.00 | 0.00 | 0.00 | 1,936.00 |
| 87-4 | 1,936.00 | 519.00 | 0.00 | 0.00 | 519.00 | 1,417.00 |
| 88-1 | 2,073.00 | 1,803.00 | 0.00 | 0.00 | 1,803.00 | 270.00 |
| 88-2 | 2,073.00 | 1,634.00 | 0.00 | 0.00 | 1,634.00 | 439.00 |
| 88-3 | 2,334.00 | 1,374.00 | 0.00 | 211.00 | 1,163.00 | 1,171.00 |
| 88-4 | 2,073.00 | 1,374.00 | 0.00 | 0.00 | 1,374.00 | 699.00 |
| 89-1 | 2,909.00 | 1,443.00 | 0.00 | 0.00 | 1,443.00 | 1,466.00 |
| 89-2 | 3,153.00 | 1,443.00 | 0.00 | 0.00 | 1,443.00 | 1,710.00 |
| 89-3 | 3,463.00 | 1,443.00 | 0.00 | 222.00 | 1,221.00 | 2,242.00 |
| 89-4 | 3,153.00 | 1,444.00 | 0.00 | 0.00 | 1,444.00 | 1,709.00 |
| 90-1 | 2,883.00 | 1,424.00 | 0.00 | 0.00 | 1,424.00 | 1,459.00 |
| 90-2 | 2,883.00 | 1,424.00 | 0.00 | 0.00 | 1,424.00 | 1,459.00 |
| 90-3 | 3,206.00 | 1,425.00 | 0.00 | 219.00 | 1,206.00 | 2,000.00 |
| 90-4 | 2,883.00 | 1,425.00 | 0.00 | 0.00 | 1,425.00 | 1,458.00 |
| 91-1 | 2,737.00 | 1,324.00 | 0.00 | 0.00 | 1,324.00 | 1,413.00 |
| 91-2 | 2,737.00 | 1,324.00 | 0.00 | 0.00 | 1,324.00 | 1,413.00 |
| 91-3 | 1,535.00 | 917.00 | 0.00 | 141.00 | 776.00 | 759.00 |
| 91-4 | 0.00 | 4,000.00 | 0.00 | 0.00 | 4,000.00 | -4,000.00 |
| | $ 44,116.00 | $ 25,740.00 | $ - | $ 793.00 | $ 24,947.00 | $ 19,169.00 |